

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

NORMAN TIMOTHY GREGORY,

Plaintiff,

No. CIV S-04-2523 DFL PAN P

vs.

T. AYERS, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff claims that defendants violated his constitutional rights by acting with deliberate indifference to his serious medical needs, retaliating against him for filing inmate grievances, and depriving him of due process in a prison disciplinary proceeding. This matter is before the court on defendants' motion to dismiss this action pursuant to the unenumerated portion of Fed. R. Civ. P. 12(b) due to plaintiff's failure to exhaust administrative remedies prior to suit, and pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

On May 11, 2005, plaintiff received the notice required by Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003) with respect to the requirements for opposing a motion to dismiss for failure to exhaust administrative remedies.

1 ALLEGATIONS OF THE COMPLAINT

2 Plaintiff's complaint contains the following claims and allegations in support  
 3 thereof. First, on April 5, 2004, defendant Ramirez<sup>1</sup> acted with deliberate indifference to  
 4 plaintiff's serious medical needs by refusing to give him food as ordered by a physician after  
 5 plaintiff completed a medically directed fast in advance of lab tests. Second, on or about April  
 6 28, 2004 and April 29, 2004, defendants Reuter and Glensor retaliated against plaintiff and  
 7 interfered with his "right of access" by threatening to withhold plaintiff's personal property  
 8 unless plaintiff dropped a inmate grievance that he had filed against defendant Ramirez. Third,  
 9 on April 30, 2004, defendants Reuter and Coombs retaliated against plaintiff for filing an inmate  
 10 grievance against defendants Reuter and Glensor by ordering plaintiff out of his cell, proceeding  
 11 to "tear up" plaintiff's cell, and breaking plaintiff's walkman. Fourth, defendants Phillips and  
 12 Clayton retaliated against plaintiff by filing false disciplinary charges against him. Finally,  
 13 defendants Gentry, Knowles, Clayton, Grannis, Shepherd, Ayers, Kelsch, Reuter, Coombs,  
 14 Phillips and Runnels "individually and collectively" conspired to, and did, cause plaintiff to  
 15 suffer, unlawful disciplinary action, unlawful retaliation, and chill his right to file administrative  
 16 appeals.

17 DEFENDANTS' MOTION

18 Defendants make the following contentions in their motion to dismiss. First,  
 19 plaintiff failed to exhaust his administrative remedies with respect to his Eighth Amendment  
 20 claim against defendant Ramirez, his claim of retaliation and filing a false disciplinary against  
 21 defendant Clayton, his conspiracy to chill his appeal rights against defendants Gentry, Knowles,  
 22 Clayton, Grannis, Shepherd, Ayers, Kelsch, Glensor, Reuter, Coombs, Phillips, and Runnels and  
 23 his denial of access and violation of due process claim against defendants Gentry, Knowles,

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25 <sup>1</sup> Defendant Ramirez is identified as "D. Ramirez" in the complaint filed November 29,  
 26 2004.

1 Clayton, Grannis, Shepherd, Ayers, Coombs, Phillips, and Runnels. Second, defendants contend  
2 that plaintiff has failed to state any cognizable claim for relief against any defendant.

3 ANALYSIS

4 I. Failure to Exhaust Administrative Remedies

5 “Section 1997e(a) of Title 42 of the United States Code provides:

6 No action shall be brought with respect to prison conditions under  
7 [42 U.S.C. § 1983], or any other Federal law, by a prisoner  
8 confined in any jail, prison, or other correctional facility until such  
administrative remedies as are available are exhausted.

9 This exhaustion requirement is mandatory. Booth v. Churner, 532 U.S. 731, 741 (2001).”  
10 McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002); see also Porter v. Nussle, 534 U.S.  
11 516, 524 (2002). Exhaustion must precede the filing of the complaint and compliance with the  
12 statute is not achieved by satisfying the exhaustion requirement during the course of an action.  
13 McKinney, 311 F.3d at 1199. Defendants have the burden of establishing that plaintiff failed to  
14 satisfy the exhaustion requirement of 42 U.S.C. § 1997e(a). See Wyatt, 315 F.3d at 1120; Brown  
15 v. Valoff, 422 F.3d 926, 936-37 (9th Cir. 2005).

16 A. Plaintiff’s Claim Against Defendant Ramirez

17 In support of their motion to dismiss, defendants present evidence that on or about  
18 April 12, 2004, plaintiff filed an inmate grievance, dated April 6, 2004, against defendant  
19 Ramirez complaining that defendant Ramirez had denied him food on April 5, 2004 after  
20 completion of medically ordered lab tests. (See Ex. B to Defendants’ Motion to Dismiss, filed  
21 August 29, 2005, Declaration of A. Orozco, at ¶ 13 and Attachment 1 thereto.) The grievance  
22 was assigned Log No. 04-0620. (Id.) Defendants contend both that plaintiff did not pursue this  
23 grievance to the third and final level of administrative review, and that plaintiff did not claim  
24 therein that defendant Ramirez had been deliberately indifferent to his serious medical needs.

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1 In opposition to the motion, plaintiff contends that he was blocked from pursuing  
2 this grievance through all levels of administrative review by the alleged actions of defendants  
3 Reuter and Glensor, which are the subject of plaintiff's second cause of action.

4 Attached to plaintiff's complaint is a memorandum dated July 8, 2004 to plaintiff  
5 from defendant Mike Knowles. In that memorandum, defendant Knowles considered and  
6 rejected plaintiff's administrative grievance charging defendants Glensor and Reuter with  
7 threatening plaintiff with disciplinary action for pursuing a grievance against defendant Ramirez.  
8 (Attachment to Complaint, Memorandum dated July 8, 2004 (hereafter July 8, 2004  
9 Memorandum, at 1.) The latter grievance was assigned Log No. FSP 04-00733. (Id.) In that  
10 memorandum, defendant Knowles, inter alia, denied plaintiff's request for review of grievance  
11 Log. No. 04-0620 at the second level of review on the ground that such review was untimely.  
12 (July 8, 20004 Memorandum, at 5.)<sup>2</sup> The memorandum specifically advised plaintiff that the  
13 "issue" could be submitted for Director's Level Review. (Id.)

14 On October 14, 2004, defendant Grannis issue a Director's Level Decision was  
15 issued to plaintiff denying inmate grievance FSP 04-00733. (Attachment to Complaint,  
16 Director's Level Appeal Decision dated October 14, 2004.) Subsumed in that decision are  
17 findings concerning the adequacy of review of plaintiff's allegations, including those concerning  
18 grievance Log No. 04-0620. (Id. at 2.)

19 After careful review of the record herein, this court finds that the proceedings on  
20 Log No. FSP 04-00733 were sufficient to exhaust plaintiff's administrative remedies with respect  
21 to the allegations against defendant Ramirez contained in grievance Log No. 04-0620.

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22 <sup>2</sup> Defendant Knowles' determination was based on (1) denials by Lt. Glensor and Sgt.  
23 Reuter that they threatened plaintiff to coerce him into dropping his grievance against defendant  
24 Ramirez; (2) plaintiff had not presented any evidence to substantiate his claim that Sgt. Reuter  
25 had threatened him; (3) plaintiff's request for second level review was dated April 27, 2004, two  
26 days before his discussion with Lt. Glensor and Sgt. Reuter; and (4) plaintiff had not submitted  
his request for second level review through the proper institutional channels nor had he informed  
the inmate Appeals Coordinator that he felt threatened and therefore did not timely seek second  
level review. (Memorandum dated July 8, 2004, at 4-5.)

1 Moreover, the court further finds that the allegations of the latter grievance are sufficiently  
2 similar to the claim raised in this action against defendant Ramirez to satisfy the exhaustion  
3 requirement of 42 U.S.C. § 1997e.

4 For all of the foregoing reasons, this court finds that plaintiff satisfied the  
5 exhaustion requirement of 42 U.S.C. § 1997e(a) with respect to his claim against defendant  
6 Ramirez.

7 B. Plaintiff's Claim Against Defendant Clayton

8 Defendants contend that plaintiff did not submit any inmate grievance against  
9 defendant Clayton claiming retaliation or submission of a false disciplinary report against  
10 plaintiff, and they present evidence to support this contention. (See Ex. A to Motion to Dismiss,  
11 Declaration of N. Grannis, at ¶ 10; Ex. B to Motion to Dismiss, Orozco Declaration, at ¶ 15.)  
12 Plaintiff disputes this evidence, contending that his grievance Log No. 04-1094 includes  
13 allegations against defendant Clayton.

14 The record reflects that defendant Clayton was the supervisor who reviewed and  
15 signed off on a rules violation report by defendant Phillips charging plaintiff with making false  
16 allegations against a peace officer. (Attachment to Complaint, Rules Violation Report dated  
17 June 7, 2004.) Through grievance Log No. 04-1094, plaintiff exhausted administrative remedies  
18 with respect to his contentions arising out of those disciplinary proceedings. (Attachment to  
19 Complaint, Inmate/Parolee Appeal Form Log No. 04-1094.) Those administrative proceedings  
20 were adequate to exhaust administrative remedies with respect to plaintiff's claim against  
21 defendant Clayton.

22 C. Plaintiff's Fifth Claim for Relief

23 Defendants contend that plaintiff did not submit any inmate grievance against  
24 defendants Gentry, Knowles, Clayton, Grannis, Shepherd, Ayers, Kelsch, Glensor, Reuter,  
25 Coombs, Phillips or Runnels alleging conspiracy to chill his appeal rights, nor any grievance  
26 against defendants Gentry, Knowles, Clayton, Grannis, Shepherd, Ayers, Coombs, Phillips or

1 Runnels alleging denial of access or violation of due process and they present evidence to  
2 support these contentions. (See Ex. A to Motion to Dismiss, Grannis Declaration, at ¶ 10; Ex. B  
3 to Motion to Dismiss, Orozco Declaration, at ¶ 15.)

4 In opposition to the motion, plaintiff contends that (1) all of his grievances were  
5 merged into one grievance by defendants Gentry and Knowles, and (2) these claims were all  
6 referred to at page 56 of plaintiff's inmate grievance Log No. 04-1094, a copy of which is  
7 attached to the complaint.

8 The court has carefully reviewed Log No. 04-1094, a copy of which is attached to  
9 plaintiff's complaint. Therein, plaintiff alleges, inter alia, that defendant Kelsch "deliberately  
10 deleted [plaintiff's] written statement, documents and physical evidence to assist Lt. Phillips, Lt.  
11 Glensor, Sgt. Reuter and C/O Coombs in retaliating against [plaintiff]." (Attachment to  
12 Complaint, Log No. 04-1094, at 2.) Those allegations, without more, are insufficient to state a  
13 cognizable claim of conspiracy to chill plaintiff's appeal rights. Moreover, the gravamen of the  
14 complaint raised in Log No. 04-1094 is a challenge to the disciplinary conviction that followed  
15 defendant Phillips' issuance of the rules violation report for making false charges against a peace  
16 officer. The hyperbole in the grievance notwithstanding, this court does not find that plaintiff  
17 exhausted administrative remedies with respect to any conspiracy claim against defendants  
18 Gentry, Knowles, Clayton, Grannis, Shepherd, Ayers, Kelsch, Glensor, Reuter, Coombs, Phillips  
19 or Runnels. Moreover, for the reasons set forth in section IID, infra, this court finds that the  
20 complaint does not state a cognizable conspiracy claim against any named defendant. For these  
21 reasons, this aspect of plaintiff's fifth claim for relief should be dismissed.

22 Liberally construed, the allegations of grievance Log No. 04-1094 are sufficient to  
23 exhaust administrative remedies with respect to plaintiff's claim that defendants Kelsch, Phillips,  
24 Glensor, Reuter, Coombs and Gentry violated plaintiff's right to due process when they affirmed  
25 the disciplinary conviction during the grievance process. However, for the reasons set forth in  
26 section IIC and D, infra, such a claim is not cognizable in this § 1983 action.

1 In addition, to the extent that the claimed “denial of access” is a claim that said  
2 defendants by their actions attempted to chill plaintiff’s right to file inmate grievances, the  
3 allegations of grievance Log No. 04-1094 is insufficient to exhaust such a claim against  
4 defendants Knowles, Grannis, Shepherd, or Ayers. Even if the allegations of the grievance are  
5 sufficient to exhaust that claim against defendants Kelsch, Phillips, Clayton, Glensor, Reuter,  
6 Coombs and Gentry, for the reasons set forth in section IID, infra, the allegations are insufficient  
7 to state a claim upon which relief may be granted.

8 For these reasons, plaintiff’s fifth claim for relief should be dismissed as to all  
9 defendants.

## 10 II. Failure to State A Claim

11 Defendants also contend that none of the allegations of the complaint are  
12 sufficient to state a cognizable claim for relief. In considering a motion to dismiss, the court  
13 must accept as true the allegations of the complaint in question, Hospital Bldg. Co. v. Rex  
14 Hospital Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to  
15 the party opposing the motion and resolve all doubts in the pleader's favor. Jenkins v.  
16 McKeithen, 395 U.S. 411, 421, reh'g denied, 396 U.S. 869 (1969). Moreover, pro se pleadings  
17 are held to a less stringent standard than those drafted by lawyers. Haines v. Kerner, 404 U.S.  
18 519, 520 (1972). A motion to dismiss for failure to state a claim should not be granted unless it  
19 appears beyond doubt that plaintiff can prove no set of facts in support of the claim that would  
20 entitle him to relief. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984), citing Conley v.  
21 Gibson, 355 U.S. 41, 45-46 (1957); see also Palmer v. Roosevelt Lake Log Owners Ass'n, 651  
22 F.2d 1289, 1294 (9th Cir. 1981).

### 23 A. Defendant Ramirez

24 Defendants first contend that plaintiff’s allegations that, despite a doctor’s order,  
25 defendant Ramirez denied him breakfast and a sack lunch on April 5, 2004 following a  
26 medically-ordered fast are insufficient to state a cognizable claim for violation of plaintiff’s

1 Eighth Amendment rights. Defendants contend that deprivation of one or two meals on a single  
2 day does not violate the constitution, and that plaintiff has failed to allege that the alleged denial  
3 of meals caused him any harm or injury.

4           Plaintiff's claimed deprivation of breakfast and lunch on one day is insufficient to  
5 state a cognizable claim for violation of his right to adequate nutrition under the Eighth  
6 Amendment. See LeMaire v. Maass, 12 F.3d 1444, 1456 (9<sup>th</sup> Cir. 1993) (quoting Hudson v.  
7 McMillian, 503 U.S. 1, 9 (1992) ("extreme deprivations are required to make out a conditions-of  
8 confinement claim. . . ."). Nor are the allegations sufficient to state a cognizable claim for  
9 deliberate indifference to a serious medical need in violation of the Eighth Amendment. See  
10 Farmer v. Brennan, 511 U.S. 825, 838 (1994) (in order to state cognizable claim inmate must  
11 allege facts which show prison official knew of and disregarded an excessive risk to an inmate's  
12 health). Accordingly, the court will recommend dismissal of plaintiff's claim against defendant  
13 Ramirez.

#### 14           B. Retaliation Claims

15           Defendants contend that plaintiff has failed to state cognizable retaliation claims  
16 against either defendants Reuter or Glensor based on the alleged refusal to return plaintiff's radio  
17 unless he dropped his grievance against defendant Ramirez, or defendants Reuter and Coombs  
18 for the alleged retaliatory cell search and destruction of plaintiff's walkman. This aspect of  
19 defendants' motion, however, is based on argument from their version of the facts and not on the  
20 allegations of the complaint as viewed in a light favorable to the plaintiff. The allegations of the  
21 complaint are sufficient to state cognizable retaliation claims against these three defendants.  
22 Defendants' motion to dismiss plaintiff's second and third claims for relief should be denied.

#### 23           C. Fourth Claim for Relief

24           In his fourth claim for relief, plaintiff claims that defendants Phillips and Clayton  
25 retaliated against him by filing false disciplinary charges against plaintiff in retaliation for  
26 plaintiff's filing of an inmate grievance. Defendants seek dismissal of this claim on several



1 grounds, including that it is barred by the rule announced in Edwards v. Balisok, 520 U.S. 641  
2 (1997). In Edwards, the U.S. Supreme Court extended the rule announced in Heck v. Humphrey,  
3 512 U.S. 477 (1994), to prison disciplinary proceedings. Specifically, the court held that a suit  
4 for damages on a civil rights claim concerning an allegedly unconstitutional disciplinary  
5 conviction that necessarily implies the invalidity of the deprivation of good-time credits is not  
6 cognizable in a § 1983 action unless the conviction has been reversed or expunged or the lost  
7 time credits have been restored.

8           The record reflects that plaintiff lost sixty days of good time credits as a result of  
9 the disciplinary conviction that resulted from the rules violation report issued by defendant  
10 Phillips and approved by defendant Clayton. (See Attachment to Complaint, Log. No. 04-1094,  
11 at 6.) Plaintiff's claim against these defendants implicates the validity of that credit loss, and  
12 there is no evidence that those lost credits have been restored or that the disciplinary conviction  
13 has been set aside. Plaintiff's fourth claim for relief should therefore be dismissed without  
14 prejudice. See Trimble v. City of Santa Rosa, 49 F.3d 583, 585 (9<sup>th</sup> Cir. 1995) (holding that  
15 §1983 claims barred by Heck should be dismissed without prejudice).

16           D. Fifth Claim for Relief

17           Defendants seek dismissal of the conspiracy claim raised in plaintiff's fifth claim  
18 for failure to state a cognizable claim. For the reasons set forth supra, plaintiff failed to exhaust  
19 administrative remedies with respect to any claim that defendants conspired to violate his  
20 constitutional rights. Moreover, the allegations of conspiracy are too vague and conclusory to  
21 support such a claim in this § 1983 action. For these reasons, plaintiff's conspiracy claim should  
22 be dismissed.

23           Defendants also contend that plaintiff has failed to state a cognizable claim for  
24 "denial of access." Defendants contend that the record shows that plaintiff was in fact permitted  
25 to take his grievances to the third and final level of administrative review, and that he was not  
26 prevented from bringing any civil rights action arising from the events complained of.

1 In Lewis v. Casey, 518 U.S. 343 (1996), the United States Supreme Court held  
 2 that prison inmates have a constitutionally protected right to access the courts to bring civil rights  
 3 actions to challenge their conditions of confinement and to bring challenges to their criminal  
 4 convictions. Lewis v. Casey, 518 U.S. at 351. The right of court access also includes the right to  
 5 access prison grievance procedures. See Bradley v. Hall, 64 F.3d 1276, 1279 (9<sup>th</sup> Cir. 1995).  
 6 However, the right of access to the courts “guarantees no particular methodology but rather the  
 7 conferral of a capability -- the capability of bringing contemplated challenges to sentences or  
 8 conditions of confinement before the courts.” Id. at 356. To state a cognizable claim for  
 9 violation of this right, plaintiff must allege facts that show that defendants by their acts  
 10 prevented him from bringing, or caused him to lose, an actionable claim of this type. Id.

11 The record demonstrates that plaintiff ultimately was able to pursue his inmate  
 12 grievances through all levels of administrative review<sup>3</sup> and that no action by any defendant  
 13 prevented plaintiff from bringing this civil rights action. Plaintiff’s claim for denial of access  
 14 should therefore be dismissed.

15 Finally, plaintiff alleges in conclusory fashion that several defendants violated his  
 16 right to due process. These allegations are only cognizable, if at all, in connection with a claim  
 17 that there was insufficient evidence to support his disciplinary conviction. For the reasons set  
 18 forth in section IIC, supra, however, such a claim is barred by Edwards v. Balisok.

19 For all of the foregoing reasons, plaintiff’s fifth claim for relief does not state a  
 20 cognizable claim for relief against any defendant named therein. It should therefore be  
 21 dismissed.

22 In accordance with the above, IT IS HEREBY RECOMMENDED that:

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 25 <sup>3</sup> It is true that plaintiff’s initial grievance against defendant Ramirez was not pursued  
 26 directly to the final level of administrative review. It was, however, presented and considered in  
 conjunction with his grievance against defendants Reuter and Glensor for alleged retaliation.

1           1. Defendants' August 29, 2005 motion to dismiss be denied as to plaintiff's  
2 retaliation claims against defendants Reuter, Glensor, and Coombs, and granted in all other  
3 respects;

4           2. Plaintiff's claims arising out of his June 30, 2004 disciplinary conviction on  
5 charges of making false allegations against a peace officer be dismissed without prejudice; and

6           3. Defendants Reuter, Glensor and Coombs be directed to answer the second and  
7 third claims raised in plaintiff's complaint within twenty days from the date of any order by the  
8 district court adopting these findings and recommendations.

9           These findings and recommendations are submitted to the United States District  
10 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
11 days after being served with these findings and recommendations, any party may file written  
12 objections with the court. The document should be captioned "Objections to Magistrate Judge's  
13 Findings and Recommendations." The parties are advised that failure to file objections within  
14 the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951  
15 F.2d 1153 (9th Cir. 1991).

16 DATED: March 2, 2006.

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19 UNITED STATES MAGISTRATE JUDGE

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